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IN THE

Supreme Court of the United States

October Term, 1970

No. 96

A. T. GORDON, *et al.*,
Petitioners,

v.

GRANVILLE H. LANGE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF *AMICUS CURIAE* SEATTLE SCHOOL DISTRICT NO. 1

JAMES R. ELLIS
2000 IBM Building
Seattle, Washington 98101
Counsel for Amicus
Seattle School District No. 1

September 11, 1970

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SEATTLE SCHOOL DISTRICT NO. 1

SUMMARY OF ARGUMENT

The 60% majority vote requirement gives to the vote of each person who votes against property tax levies and bond issues 50% more weight than is given to the vote of each person who votes for such propositions. Three "For" votes are required to "equal" two "Against" votes.

When a state uses a public election to determine an issue, the right of any qualified voter to vote in such election cannot be diluted by any classification or weighting scheme, whether direct or indirect, unless such classifica-

tion or weighting is *necessary* to promote a *compelling* state interest.

Weighted voting is not necessary to secure municipal solvency nor to hold down property taxes. Weighted voting is not the only nor even the best method of achieving these purposes. In fact, weighted voting has not been generally effective to limit local indebtedness or to achieve low property tax levels. Thus, weighted voting is a state classification which cannot be justified under the applicable constitutional test.

There is no logical distinction between the dilution and denial of the vote. Both dilution and denial are equally discriminatory. Each person is entitled to one vote whenever the state invokes the electoral process whether for the purpose of electing legislative representatives or school board members or deciding local bond issues or excess levies. This does not mean one-half vote for some; it means one-man-one-vote.

The weighted voting provisions before this court discriminate between voters on the basis of *how* they may vote by diluting the votes of those who would vote in favor of property tax levies and bond issues. These provisions constitute an invalid discrimination under the equal protection clause.

INTEREST OF *AMICUS CURIAE*

Seattle School District No. 1 is a political subdivision of the State of Washington. This brief is submitted on behalf of the Seattle School District by its authorized law officer, Mr. James R. Ellis, under the provisions of Rule 42(4), Rules of the Supreme Court of the United States.

The Washington Constitution and related statutes contain weighted voting provisions for certain tax levy and bond issue elections similar to those in West Virginia. Local property tax levies and bond issues in Washington which exceed specified limits must, as in West Virginia, be approved by a 60% majority at an election held for such purpose.[1]

The Seattle School Board will be directly and significantly affected by the decision of the Supreme Court in the instant case, *Gordon v. Lance*. In each of the past 13 years, the Seattle School District has been required to secure 60% approval by the voters of property tax levy propositions to provide operating funds.

On November 4, 1969, the District Board of Directors submitted to the voters a proposition to authorize an excess levy of $40,320,000 for regular school operating and maintenance expenses on all taxable property in the district for collection in 1971. The proposition was approved by 56.5% of the voters. Since the measure did not receive 60% affirmative approval, the excess tax levy was certified by the election officials as having failed.

A Seattle resident filed a suit in United States District Court for the Western District of Washington, Northern Division, alleging that the provisions of the Washington Constitution and related statutes requiring a 60% affirmative vote for excess levies and bond issues violated the equal protection clause of the United States Constitu-

1. The Seventeenth Amendment to the Washington State Constitution provides that property tax levies in excess of a 40-mill limitation may be exceeded only when three-fifths of the electors authorize an excess levy. Article VIII, Section 6, as amended by the Twenty-Seventh Amendment, provides that local taxing districts may not incur indebtedness in excess of specified limitations unless authorized to do so at an election in which ⅜ of the voters vote in the affirmative.

tion.[2] The Seattle School District was a named party to the action and supported the position of the plaintiff therein. The District Court stayed all proceedings until the United States Supreme Court decides *Gordon v. Lance.*

POSITION OF SEATTLE SCHOOL DISTRICT NO. 1

Amicus Seattle School District No. 1 supports the position of respondent *Lance* that the relevant weighted voting provisions of the West Virginia Constitution and related statutes violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Similar restrictions contained in other state constitutions and statutes are equally void.

It is the position of *Amicus* Seattle School District that the weighted counting of votes based upon the way a person votes abridges the fundamental right of every voter to have his vote counted equally in any public election in which he participates.

There are two primary questions before this court:

(1) What Constitutional test should be applied to determine whether state classifications affecting voting rights comply with the mandate of the Equal Protection Clause?

(2) Do the relevant weighted voting provisions of the West Virginia Constitution comply with the appropriate Constitutional test?

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2. *Nelson v. Evans et al,* United States District Court, Western District of Washington, Northern Division, No. 8633.

STATE CLASSIFICATIONS AFFECTING VOTING RIGHTS MUST BE NECESSARY TO PROMOTE A COMPELLING GOVERNMENTAL INTEREST

The Supreme Court has adopted two different standards to determine whether classifications under state law comply with the Equal Protection Clause. The court has applied the "traditional" or "minimum" standard of rational relation to permissible goal when determining the validity of state classifications which do not abridge fundamental rights. Thus, legislative classifications dealing with economic or business regulation will be upheld if they bear some rational relationship to a legitimate state purpose. *McGowan v. Maryland,* 366 U.S. 420, 6 L.ed.2d 393, 81 S. Ct. 1101 (1961). However, for many years, the court has applied a different and stricter standard to measure the equal protection compliance of state classifications which affect fundamental rights and the court has given strict scrutiny to such classifications.

Where a state legislative classification "involves one of the basic civil rights of man," the court will require "strict scrutiny of the classification." *Skinner v. Oklahoma,* 316 U.S. 535, 541, 86 L.ed. 1655, 62 S. Ct. 1110, 1113 (1942). State classifications affecting fundamental rights will be upheld only upon a showing that the classification is "necessary to promote a compelling governmental interest." *Shapiro v. Thompson,* 394 U.S. 618, 634, 22 L.ed.2d 600, 89 S. Ct. 1322 (1969). The classification is not "necessary" if an alternative means of achieving the governmental purpose is available which does not infringe upon a person's fundamental rights. *Shapiro v. Thompson,* 394 U.S. 618, 22 L.ed.2d 600, 89 S. Ct. 1322 (1969).

The right to exercise the franchise is a fundamental right. *Reynolds v. Sims*, 377 U.S. 533, 12 L.ed.2d 506, 84 S. Ct. 1362 (1964). The general presumptions of constitutionality do not pertain in voting rights cases. *Kramer v. Union Free School District*, 395 U.S. 621, 23 L.ed.2d 583, 89 S. Ct. 1886 (1969). The Supreme Court has consistently applied the strict standard of equal protection compliance to cases involving voting rights.

In *Kramer v. Union Free School District*, 395 U.S. 621, 23 L.ed.2d 583, 89 S. Ct. 1886 (1969), the court applied this strict equal protection standard to voting classifications in clear and unmistakable terms:

> "Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court. *Reynolds v. Sims, supra.* See *Avery v. Midland County*, 390 U.S. 474, 20 L.Ed.2d 45, 88 S. Ct. 1114 (1968). No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See *Carrington v. Rash, supra*, 380 U.S. at 96." 395 U.S. at 626.

The United States Supreme Court has never applied the rational relation test to *uphold* a state classification which either dilutes or denies the right of any person, who is qualified by age, residence, citizenship or literacy, to cast his vote at a public election and have it counted equally with all other persons who vote in that election.

The rule established by the Supreme Court is clear. Classifications restricting voting rights are subjected to a test with two essential elements. First, the state must establish that the classification promotes a governmental interest which is "compelling." Second, the state must demonstrate that the classification is "necessary" to promote this purpose. If any alternative method less restrictive of fundamental rights is available to achieve the governmental purpose, the classification will not be deemed to be "necessary."

Unless the weighting of votes is "necessary" to promote a "compelling" interest of the State of West Virginia, the relevant provisions of the West Virginia Constitution must be held invalid under the Equal Protection Clause of the Fourteenth Amendment.

WEIGHTED VOTING IS NOT NECESSARY TO PROMOTE A COMPELLING STATE INTEREST

Advocates of weighted voting generally advance two state purposes to justify extraordinary majority requirements for tax and bond elections: (1) such requirements are needed to hold down taxes upon property, and (2) such requirements are needed to preserve municipal solvency and fiscal integrity.

1. The Protection of Property Owners As a Class Is Not a Compelling Government Interest

A primary reason for the presence of weighted voting provisions in state constitutions and related statutes was the desire to limit property taxes for the purpose of pro-

tecting property owners as an economic class.[3] While this may be a valid governmental purpose it is clearly not the "compelling" governmental interest required to justify diluting the votes of qualified voters.

A state may, of course, limit property taxes or protect a particular economic group so long as it does not misuse the franchise in the process. However, once the state has invoked the franchise for such purpose, it cannot validly limit the right to vote to persons who own property. *Cipriano v. City of Houma*, 395 U.S. 701, 23 L.ed.2d 647, 89 S. Ct. 1897 (1969); *City of Phoenix, Arizona v. Kolodziejski*, 90 S. Ct. 1990 (1970).

Most constitutional and statutory weighted voting provisions do not expressly state that the right to vote is diluted or weighted to protect an economic group. The method of weighting votes by requiring a super majority has *direct* application on *how* a person votes rather than *who* he is or what he owns. It does not, however, take much imagination to pierce the political veil and see that those persons who oppose local property tax issues will effectively reflect the economic interests of property owners as a class. Weighted voting is thus designed to use public elections to accomplish indirectly the same result that could not be validly accomplished by directly restricting the right to vote to the owners of property.

The fact that a classification by weighted voting is more

3. The official Voter's Pamphlet published in 1938 by the State of Washington in connection with the 40-mill tax limit initiative election of that year states in argument for this measure:

"Initiative 129 safeguards the *taxpayer* in the voting of special levies by requiring their approval by a substantial majority." (Emphasis added) State of Washington, Voter's Pamphlet (1938) at p. 8.

subtle and indirect than a classification by denial of the vote does not make it less discriminatory. If the framers of weighted voting provisions had given half a vote to those who do not own property, the electoral discrimination would have been more obvious but no more effective. The weighted vote provisions are not saved from the mandate of the equal protection clause by the subtlety that they merely dilute the votes of persons who will vote in favor of the taxation of property.

2. The Government Interest of the State in Limiting Property Taxes Is Not Achieved by Weighted Voting

Even if limiting property taxes has a valid governmental purpose separate from the protection of property owners, it certainly cannot be maintained that the use of weighted voting is necessary to achieve such purpose. It is neither the best nor the only nor the least restrictive means of reducing property taxation. In fact, weighted voting has not generally limited property taxes and now bears little, if any, rational relation to the general limitation of property taxation.

First, there is no evidence that a simple majority vote approval for excess property tax levies would necessarily result in a general increase in property tax levels. Commenting on this issue, the California Supreme Court in *Westbrook v. Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970) stated:

> "Second, the information available to us does not warrant a characterization of property owners as a beleaguered minority which would be forced to shoulder the total cost of bond-financed projects. There are indications that a substantial majority of the registered

voters in California own their own homes. In addition, it is important to recognize that those who do not own real property nevertheless pay property taxes indirectly. Rental payments of lessees of taxable real property are to a material extent a function of the property tax. Those few who neither own nor rent taxable property must still purchase goods and services from commercial enterprises that do and which, to some extent at least, incorporate that tax in the prices charged consumers.

"Thus, the factual predicates of respondents' contention do not exist. The probability of a property-owning minority being subjected to confiscatory taxation by the unbridled appetites of the property less masses is no more than 'theoretically imaginable.' (*United Mine Workers v. Illinois State Bar Assn.* (1967) 389 U.S. 217, 224, 19 L.ed.2d 426, 88 S. Ct. 353) No such remote dangers can justify the 'immediate and crippling impact' (*Williams v. Rhodes, supra,* 393 U.S. 23, 33, 89 S. Ct. 5) on the rights of all citizens (property owners or not) who favor certain proposed governmental action, to receive equal protection of the law." 471 P.2d at 508.

A review of property tax levels in each of the 50 states further indicates that there is, in fact, no general positive correlation between presence of weighted voting provisions and low property taxes.

COMPARISON OF PROPERTY TAX BURDEN[4] BETWEEN STATES WITH WEIGHTED VOTING AND STATES WHICH DO NOT WEIGHT VOTING

	Property Taxes in Dollars per $1,000 of Personal Income
Average Property Tax Levels of States with Weighted Vote Provisions (20 states)	46.72
Average Property Tax Levels of States without Weighted Vote Provisions (30 states)	39.82
United States Average	44.39
United States Median	44.65

In view of these facts, it certainly cannot be maintained that weighted voting generally results in lower property tax levels or that there is any rational relationship between weighted voting and low property tax burdens. Ironically, in the case of the Seattle School District, the net effect of weighted voting has been to increase costs resulting from the holding of resubmission elections.[5]

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4. This summary comparison of property tax burden between states with weighted voting and states which do not weight voting was derived from the information and sources set forth in Appendix A.

5. A review of recent school district excess levy elections in the Seattle metropolitan area reveals that weighted voting has not, in fact, generally limited property tax levels. The net effect of weighted voting in many cases simply has been the holding of resubmission elections. In the Seattle School District, five out of the last six annual levies were resubmitted for the sole purpose of raising a simple majority to a 60% majority. (One levy received more than 60% at the first submission.) All of the resubmittal levies were ultimately passed without change so the net effect of the weighted vote requirement was to increase total school costs by the average cost of each resubmission election ($65,000.00). Source: Superintendent, Seattle Public Schools. In King and Pierce Counties, 24 levies were resubmitted in 1968-69 for the sole purpose of raising a simple majority to a 60% majority. All passed on resubmission. Each school district paid for two elections. SOURCE: Superintendent of Schools, King County and Pierce County.

In the long run the most effective and perhaps the only effective means of limiting property taxes is to provide alternative sources of revenue to meet essential governmental purposes. For the hard truth is that essential services will ultimately be met: children must be educated, sewers must be built, transportation must be provided. If property taxes are to be limited or reduced, government expenditures must be reduced or other sources of revenue must bear a proportionate higher burden. There are a wide range of different subjects of taxation available: sales tax, use tax, motor vehicle excise tax, admissions tax, cigarette tax, liquor tax, conveyance tax, business and occupation taxes, and corporate and personal income taxes.

3. The Government Interest of the State in Promoting Local Fiscal Responsibility Is Not Achieved by Weighted Voting

The preservation of municipal fiscal integrity may be a valid, even compelling, state purpose. The crucial question then remains whether weighted voting provisions are necessary to achieve this purpose.

An analysis of the history and current effect of weighted voting restrictions on the incurring of municipal debt demonstrates that weighted voting does not in fact generally tend to limit the total amount of local government indebtedness, let alone promote local government fiscal integrity.

The effect of extraordinary majority vote requirements has not been to limit total debt but simply to change the *form* of debt to avoid constitutional voting requirements. Local debt then takes the form of a variety of revenue and assessment bonds and various forms of lease-purchase financing. California is a typical example of the effect of

weighted voting on local indebtedness. The California Constitution provides that general obligation bond proposals of certain local governments must be approved by a ⅔ majority of the voters in a popular referendum. In *Westbrook v. Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970) the California Supreme Court, in reviewing the history and effect of weighted voting, stated:

> "Finally, there is impressive evidence that the two-thirds requirement has not so much limited total local government indebtedness as it has redirected borrowing into vehicles other than the general obligation bonds of regularly constituted political units. While the economic consequences of these alternate financing devices are substantially similar to those of voted general obligation bonds, they are not required to receive a two-thirds majority vote and, in some instances, permit long-term borrowing over which the public has no direct control at all.
>
> "This phenomenon has attracted the widespread, often critical, attention of legal and financial commentators. Their consensus, which we accept, is that the diversion of local borrowing into novel, more costly financing methods which often entirely evade submission to elections, renders any claim that the two-thirds vote requirement insures sound fiscal policy and popular control of long-term borrowing highly dubious at best." 471 P.2d at 505.

The California court further found that there is no evidence that weighted voting promotes greater fiscal solvency than may be achieved by majority voting:

> "Nor is there any evidence that California's two-thirds requirement (which is among the most restrictive in the nation), has produced greater fiscal security than may be achieved with a simple majority vote requirement. Although most states do not require a two-thirds vote, we have been referred to no data indicating more frequent bond defaults, lower credit

> ratings, or extravagant public projects in those states. As we have previously noted, since 1849, the State of California has been permitted to borrow in excess of its debt limit with the approval of 50 percent of those voting on a particular bond issue. (Cal. Const., art. XVI, Sec. 1.) Yet, State of California general obligation bonds are rated as high-grade bonds by the major investment advisory services. The judgment of the market place does not support respondents' argument. Indeed, the credit rating of a community may well be eventually impaired if, as a result of inability to secure a two-thirds consensus, necessary projects are deferred and the quality of life deteriorates." 471 P.2d at 505.

In short, weighted voting is not the only nor the best method of achieving municipal solvency or low property taxes. In fact, it has not generally accomplished either purpose. Certainly, weighted voting cannot be said to be "necessary" to achieve either purpose.

WEIGHTED VOTING DOES NOT ESCAPE THE SWEEP OF THE VOTING RIGHTS CASES

1. Broad Principles Set Forth in Voting Rights Cases Are Applicable to Weighted Voting

It is conceded that the instant case is one of first impression before the United States Supreme Court, but we submit that broad principles *have* been laid down by the court in the voting rights cases under which there is no logical escape from the conclusion that the instant weighted voting provisions do in fact dilute and debase the votes of individual voters in violation of the equal protection clause.

Each decision arises out of its own facts. So we have decisions involving vote dilution in legislative apportionment, *Wesberry v. Sanders*, 376 U.S. 1, 11 L.ed.2d 481, 84 S. Ct. 526 (1963); *Reynolds v. Sims*, 377 U.S. 533, 12

L.ed.2d 506, 84 S. Ct. 1362 (1964); vote denial on account of race, *Gomillion v. Lightfoot*, 364 U.S. 339, 5 L.ed.2d 110, 81 S. Ct. 125 (1960); vote denial for those who do not own property, *Kramer v. Union Free School District*, 395 U.S. 621, 23 L.ed.2d 583, 89 S. Ct. 1886 (1969); *City of Phoenix, Arizona v. Kolodziejski*, 90 S. Ct. 1990 (1970); or those who cannot afford to pay $1.50 to vote, *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 16 L.ed.2d 169, 86 S. Ct. 1079 (1966); or those in the armed services, *Carrington v. Rash*, 380 U.S. 89, 13 L.ed.2d 675, 85 S. Ct. 775 (1965); or vote dilution by the weighted counting of votes in regular elections for state officers of any kind, *Gray v. Sanders*, 372 U.S. 368, 9 L.ed.2d 821, 83 S.Ct. 801 (1963).

The fundamental basis of each of these holdings is increasingly clear. Each case has steadily strengthened the integrity of the electoral process and the right of the individual to cast his vote and have it counted equally. The weighted voting provisions contained in numerous state constitutions and statutes sit squarely astride the path of these holdings. As advocates of weighted voting analyze each Supreme Court decision on voting rights, they find themselves more closely confined in the narrow foxhole of their distinctions.

Times and conditions change. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 16 L.ed.2d 169, 86 S. Ct. 1079 (1966), Mr. Justice Douglas describes the court's evolutionary view of fundamental rights dramatically:

> "Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic

notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy v. Hogan*, 378 U.S. 1, 5-6, 84 S. Ct. 1489, 12 L.Ed.2d 653. Notions of what constitutes equal treatment for purposes of the Equal Protection clause *do* change. This Court in 1896 held that laws providing for separate public facilities for white and negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L.Ed. 256. Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954—more than a half-century later—we repudiated the 'separate-but-equal' doctrine of *Plessy* as respects public education we stated: 'In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.' *Brown v. Board of Education*, 347 U.S. 483, 492, 74 S. Ct. 686, 691, 98 L.Ed. 873. . . .

"We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. See, e.g., *Skinner v. State of Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, *Reynolds v. Sims*, 377 U.S. 533, 561-562, 84 S. Ct. 1362, 1381; *Carrington v. Rash, supra; Baxtrom v. Harold*, 383 U.S. 107, 86 S. Ct. 760, 15 L.Ed.2d 620; *Cox v. State of Louisiana*, 379 U.S. 536, 580-581, 85 S. Ct. 453, 469, 13 L.Ed.2d 471 (Black J., concurring).

"Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." 383 U.S. at 669, 670.

2. Voting Rights Cases Are Not Limited to Discriminations Arising Out of Legislative Apportionment or Geographic Location

It may be argued that the apportionment cases are not applicable to the instant situation because the dilution or weighting of votes was based upon the constitutionally irrelevant factor of location or geography. Geography, however, is only a factual accident of the apportionment cases. It is an example of a constitutionally irrelevant factor, but certainly not the only one in existence. The clue to violation of equal protection lies in the dilution by the state of the right of a qualified voter to his whole and undivided vote.

> ". . . . Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the equal protection clause of the 14th Amendment." *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 665, 16 L.Ed.2d 169, 86 S. Ct. 1079 (1966).

Gray v. Sanders, 372 U.S. 368, 9 L.ed.2d 821, 83 S. Ct. 801 (1963) rebuts the argument that the voting rights cases are limited to geographical discrimination between classes of voters or to elections involving the choice of representatives by voters. *Gray* in fact involved a statewide general election in which all types of public officers were chosen, not just representatives to a legislative body. Justice Clark writing for the majority describes the case:

> "This case, unlike *Baker v. Carr, supra,* does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives. . . .
>
> "Nor does the question here have anything to do

with the composition of the state or federal legislature." 372 U.S. at 376, 378.

The point is made crystal clear in the concurring statement of Justice Stewart in which Justice Clark joined:

> "We do not deal here with 'the basic ground rules implementing *Baker v. Carr.*' This case, on the contrary, involves statewide elections of a United States Senator and of state executive and judicial officers responsible to a statewide constituency. Within a given constitutency, there can be room for but a single constitutional rule—one voter, one vote. *United States v. Classic,* 313 U.S. 299, 85 L.Ed. 1368, 61 S. Ct. 1031." 372 U.S. at 382.

What this landmark case does hold is simply put by the court:

> "Georgia gives every qualified voter one vote in a statewide election; but in counting those votes, she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties. . . .
>
> "Every voter's vote is entitled to be counted once. It must be correctly counted and reported. As stated in *United States v. Mosely,* 238 U.S. 383, 386, 35 S. Ct. 904, 905, 59 L.Ed. 1355, 'the right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' It can be protected from the diluting effect of illegal ballots. *Ex parte Siebold,* 100 U.S. 371, 25 L.Ed. 717; *United States v. Saylor,* 322 U.S. 385, 64 S. Ct. 1101, 88 L.Ed. 1341. And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have. See *United States v. Classic, supra; Smith v. Allwright, supra.* . . .
>
> "The only weighing of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a

President. Yet when Senators are chosen, the Seventeenth Amendment states the choice must be made 'by the people.' Minors, felons, and other classes may be excluded. See *Lassiter v. Northampton County Election Board, supra,* 360 U.S. p. 51, 79 S. Ct. p. 990. *But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.* As we stated in *Gomillion v. Lightfoot, supra,* 364 U.S. p. 347, 81 S. Ct. p. 130:

"'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.'

"The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." (Emphasis added). 372 U.S. at 379-381.

3. There Is No Valid Distinction Between Denial of the Vote and Dilution of the Vote

Four important United States Supreme Court cases have clearly extended the Equal Protection Clause to voting rights discriminations not even remotely arising out of either legislative apportionment or geographic location: *Cipriano v. City of Houma,* 395 U.S. 701, 23 L.ed.2d 647, 89 S. Ct. 1897 (1969), where the state statute allowed only property owners to vote on the issuance of muncipal revenue bonds; *City of Phoenix v. Kolodziejski,* 90 S. Ct. 1990 (1970), where the state statute allowed only property owners to vote on the issuance of muncipal general obligation bonds; *Kramer v. Union Free School District,* 395 U.S. 621, 23 L.Ed.2d 583, 89 S. Ct. 1886 (1969), where the state statute limited voters in a school board election to property owners or parents of enrolled children; and *Carrington v.*

Rash, 380 U.S. 89, 13 L.ed.2d 675, 85 S. Ct. 775 (1965), where the state statute prevented members of the Armed Forces from voting in Texas elections. All of these statutes were struck down under the Equal Protection Clause. It may be argued that these cases are not relevant here because they involved "the outright denial of the right to vote based on an unjustifiable classification." This argument asserts that the denial of the vote somehow presents an equal protection question different in *kind* from diluting the vote. This reasoning stretches the principles of equal protection to the breaking point. It could not logically be contended that the court in *Cipriano or Kolodziejski* would have ruled otherwise if the non-property owning voter had been given half a vote instead of none.

We submit that there is no legal or logical distinction between diluting a man's vote and denying him the vote. If one-man-one-vote means anything, it means that once the state grants the franchise each man's vote must count equally.

As Justice Douglas stated in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 16 L.ed.2d 169, 86 S. Ct. 1079 (1966):

> "The degree of the discrimination is irrelevant." 383 U.S. at 668.

4. There Is No Valid Distinction Between Public Voting for Elected Officers and Public Voting on Issues

It may be argued that vote dilution runs afoul of equal protection only when applied to the election of representatives and not when applied to a public election on issues. The logic of this position escapes us. Should a different

standard apply to the voter who directly casts a vote on a school budget than to the voter when he casts a vote for school directors who would in turn set the budget? In each case is not each voter entitled to have his vote counted equally to determine the result? In *Kramer*, the voter was protected from discrimination in his election of school board members. In *Cipriano*, the voter was protected from discrimination in an election on a municipal revenue bond issue. In *Kolodziejski*, the voter was protected from discrimination in an election on a municipal general obligation bond issue.

The rule is aptly stated in *Hadley v. Junior College District*, 397 U.S. 50, 25 L.ed.2d 45, 90 St. Ct. 791 (1970):

> "When a court is asked to decide whether a state is required by the constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election." 397 U.S. at 54.

Some point out that the State of West Virginia could have provided for no election at all on bond issues and excess levies. This is correct but irrelevant. The fact is that the State of West Virginia *did* provide for a public election. The court in *Kramer* makes it crystal clear that:

> "The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment." 395 U.S. at 628.

It has also been asserted that special bond and levy elections are outside the reach of the Equal Protection Clause because they are not as centrally important to our system of representative government as elections for rep-

resentatives. But, neither the type of public election nor the "importance" of the public officer to be elected is significant in determining whether an equal protection question should be examined with the closest scrutiny and meet the strict test of "compelling" state interest. In *Kramer*, the elected offices were local school board members with limited powers but the court makes it clear that it is the fact of their *election* rather than the extent of their legislative duties that counts:

> "Nor is the need for close judicial examination affected because the district meetings and the school board do not have 'general' legislative powers. Our exacting examination is not necessitated by the *subject* of the election. . . ." 395 U.S. at 629.

THE STATE MAY NOT DILUTE THE VOTE OF ANY VOTER BECAUSE OF HOW HE MAY VOTE

One of the most potentially dangerous of all voting right discriminations inheres in the classification of voters according to how they may vote in a public election. Weighted voting provisions make precisely such a classification.

In *Carrington v. Rash*, 380 U.S. 89, 13 L.ed.2d 675, 85 S. Ct. 775 (1965), the court struck down a provision of the Constitution of the State of Texas because it denied servicemen the right to vote. Texas presented a variety of plausible reasons for denying the vote to servicemen. The following quotation from this decision is particularly appropriate to the discrimination inherent in weighted voting provisions:

> "The theory underlying the State's first contention is that the Texas constitutional provision is necessary to prevent the danger of a 'takeover' of the civilian community resulting from concentrated voting by

large numbers of military personnel in bases placed near Texas towns and cities. A base commander, Texas suggests, who opposes local police administration or teaching policies in local schools, might influence his men to vote in conformity with his predilections. *Local bond issues may fail, and property taxes stagnate at low levels because military personnel are unwilling to invest in the future of the area.* We stress—and this is a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation . . . *'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.'* " (Emphasis added). 380 U.S. at 93, 94.

In *Cipriano v. City of Houma*, 395 U.S. 701, 23 L.ed.2d 647, 89 S. Ct. 1897 (1969), the court observes that property owners may have a different point of view on the issuance of utility bonds than rate payers but holds that these differences of opinion are not a proper basis for giving one group the right to vote on such bonds and denying it to another. Such a classification was held not to be necessary to promote a compelling state interest.

VOTING PROCEDURES AND STANDARDS FOR LEGISLATIVE BODIES ARE INHERENTLY DIFFERENT FROM THOSE APPLICABLE TO POPULAR ELECTIONS

The argument may be made that a popular election with secret ballot and thousands of voters should legally be

governed by the same weighted voting standards which often apply to the internal functioning of a deliberative legislative body. We concede that both the voters on election day and the legislators during their legislative session decide public issues. There the similarity ends. Extending equal protection standards to apply to the *internal* state legislative process has not been suggested by the courts.

A deliberative legislative body votes openly; the voter acts by secret ballot. The legislature must establish a variety of procedural rules in order to function in a truly deliberative fashion; the voter must simply come to the polls and mark his ballot. Committee systems and party caucuses are established in a legislative body and procedures are set for public hearings, study, investigation, debate, consideration of amendments, the interrelation of committee assignments within each house and between houses and with the Governor as a legislative partner; qualifications are fixed for members of the legislature to sit as members, to serve on committees or in caucus. The inherent nature of the integral parts of the legislative voting process set a deliberative body apart from the voters at a public election.

A popular election is not a creative, amendatory, deliberative process. Each person has only one official function as a voter. He enters the booth and, in secret, votes "Yes" or "No." He is like every other voter when he enters this booth. The Equal Protection Clause guarantees him this right—no more, no less.

Whether or not the long arm of the Equal Protection Clause will ever reach the internal functioning of the legislature of a state is not now before this court and

voting procedures of legislative bodies give inapt analogies for the consideration of rights of voters at a public election.

FORM OF RELIEF

If the court holds that the weighted voting provisions of the West Virginia Constitution and statutes violate the Equal Protection Clause of the United States Constitution, the court must then determine the form of relief to be granted. The effect to be given the instant decision should be governed by the rule set forth in *Cipriano v. City of Houma*, 395 U.S. 701, 23 L.ed.2d 647, 89 S. Ct. 1897 (1969). In *Cipriano*, the court held that its decision would apply:

> "... only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final." 395 U.S. at 706.

The rule in *Cipriano* was further amplified by the court in *City of Phoenix v. Kolodziejski*, 90 S. Ct. 1990 (1970):

> "We therefore adopt a rule similar to that employed with respect to the applicability of the *Cipriano* decision: our decision in this case will apply only to authorizations for general obligation bonds which are not final as of June 23, 1970, the date of this decision. In the case of States authorizing challenges to bond elections within a definite period, all elections held prior to the date of this decision will not be affected by this decision unless a challenge on the grounds sustained by this decision has been or is brought within the period specified by state law. In the case of States, including apparently Arizona, that do not have a well-defined period for bringing challenges to bond elections, all elections held prior to the date of this decision that have not yet been challenged on the grounds sustained in this decision prior to the date of this decision will not be open to challenge

on the basis of our ruling in this case." 90 S. Ct. 1996.

The rules set forth in *Cipriano* and *Kolodziejski* are in accord with sound public policy and should be followed in the instant case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Supreme Court of Appeals of the State of West Virginia be affirmed.

Respectfully submitted,

James R. Ellis
2000 IBM Building
Seattle, Washington 98101
Counsel for Amicus
Seattle School District No. 1

APPENDIX A

COMPARISON OF PROPERTY TAX BURDEN BETWEEN STATES WITH WEIGHTED VOTING AND STATES WHICH DO NOT WEIGHT VOTING

	Property Taxes in Dollars per $1,000 of Personal Income*
United States Average	44.39
Median State	44.65
States with Extraordinary** Majority Vote Requirements (Weighted Voting) in Certain Local Bond Issue Elections	
Wyoming	69.21
South Dakota	68.44
California	61.92
Nebraska	60.60
North Dakota	59.66
Massachusetts	57.78
New Hampshire	55.38
Iowa	55.28
New York	50.53
Vermont	49.58
Idaho	46.61
Michigan	45.30
Texas	40.76
Washington	36.58
Missouri	36.12
Oklahoma	32.35
Mississippi	28.74
West Virginia	27.29
Tennessee	27.22
Kentucky	25.16

*Source: Advisory Commission on Intergovernmental Relations, State and Local Finances, Significant Features 1967 to 1970 M-50 (November 1969) at p. 26.

**Source: Compilation set forth in Practising Law Institute, Municipal Bond Problems—3 D, Course Handbook Series No. 18 (1970) at p. 243.

States Without Extraordinary** Majority Vote Requirements in Local Bond Issue Elections

	Property Taxes in Dollars per $1,000 of Personal Income
Montana	68.48
Arizona	56.70
Minnesota	56.55
New Jersey	55.03
Kansas	54.99
Colorado	52.76
Nevada	51.14
Wisconsin	50.99
Oregon	49.89
Maine	48.74
Utah	47.91
Connecticut	47.52
Indiana	46.28
Rhode Island	44.65
Ohio	42.83
Florida	41.39
Maryland	40.86
Illinois	40.56
Georgia	30.26
Pennsylvania	29.68
Vermont	28.77
Hawaii	26.52
North Carolina	26.50
Arkansas	25.54
New Mexico	25.18
Alaska	24.83
Louisiana	23.00
South Carolina	21.06
Delaware	20.46
Alabama	15.79